APPEAL NO. 93096

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. ART. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On January 6, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was "whether temporary income benefits [TIBS] may be suspended on the basis of abandonment of medical treatment without good cause." The hearing officer determined that "the claimant has not abandoned medical treatment but has received medical care for her work related back injury; therefore, she cannot be presumed to have reached maximum medical improvement [MMI] because of her abandonment of medical treatment. 28 Tex. Workers' Comp. Comm'n § 130.4 (Rule 130.4)." The hearing officer ". . . Ordered that the Interlocutory Order of November 4, 1992 is Overruled. . . ."

Appellant, carrier herein, contends that the hearing officer erred in finding (1) that the claimant "was unaware of her workers' compensation benefits especially the right to lifetime medical benefits. . . ." (2) that claimant "had transportation problems getting to a doctor. . . ." and (3) that the claimant "has not abandoned medical treatment that she cannot be presumed to have reached [MMI] because of her abandonment." The carrier requests "that [TIBS] remain suspended . . . and that the findings of the Benefits (sic) Review Officer be sustained." Claimant timely filed a response to carrier's appeal and requests that we affirm the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant was employed by (employer) herein, on April 8, 1992. Claimant testified that she and several other new employees received an orientation regarding their job duties and other employment policies and practices. Claimant stated that on Saturday, (date of injury), while performing her duties as a cashier, she injured her back lifting and moving some large heavy items around the scanner. Claimant further testified that she had pain that evening and although she was supposed to work the following day, her pain was so severe she called a manager to say that she could not work. Claimant stated she again called in the next day and told another manager about her back pain and the day after that claimant called to tell the employer that she was quitting because of her back pain. Claimant testified she was unaware that she may have been entitled to workers' compensation medical benefits. It is unclear from the testimony and evidence when TIBS began; however, it would appear 29 weeks had been paid at the time of the November 4th benefit review conference (BRC). The testimony was, and the hearing officer found, that it was only on a visit to the required medical examination (RME) doctor, (Dr. W), on July 6, 1992, that claimant realized that workers' compensation would pay her medical benefits. The hearing officer further found, based on claimant's testimony, that claimant did not seek further medical treatment, because of transportation problems, until October 29, 1992, when she was seen by her treating doctor, (Dr. S). Carrier, in the meantime,

had requested a BRC which was held on November 4, 1992. At carrier's request, the benefit review officer (BRO) issued an interlocutory order suspending payment of TIBS "on the basis of abandonment of medical treatment."

Dr. W, on July 6, 1992, diagnosed claimant as having "[l]ow back pain with radiations to both lower extremities that needs further evaluation." (Emphasis added.) Dr. S saw claimant on October 29, 1992 for low back pain, again on November 12th for follow-up, and on December 14th. At the November 12th office visit, Dr. S released claimant to light duty work. Claimant testified she has not sought employment, light duty or otherwise, because of pain in her back. An MRI was scheduled for November 3, 1992 but was cancelled because the carrier would not pay for it. There was testimony that claimant had another doctor's appointment scheduled for February 1993. The claimant testified that she has not worked since (date of injury) and that she has not sought employment because of the continued pain from her back injury.

At the CCH on January 6, 1992, several stipulations were agreed upon by the parties including the usual stipulations that claimant lived within 75 miles of (city), Texas; that the employer had workers' compensation coverage with the carrier; and that the claimant was covered by workers' compensation coverage on the date of the injury. In addition, Stipulation 7, agreed upon by the parties, provided "[o]n April 16, 1992, the Claimant suffered a work related injury for which she received medical benefits, and [TIBS] which were suspended by Interlocutory Order as of November 4, 1992."

I

Carrier alleges the hearing officer erred in finding that the claimant "was unaware of her workers' compensation benefits especially the right to lifetime medical benefits, consequently, she did not see a doctor until she went to a required medical examination." Both at the CCH and on appeal carrier emphasizes that claimant attended an orientation session and knew or should have known about her workers' compensation benefits. A great deal of the testimony by carrier's witness, the employer's personnel manager, dealt with whether the claimant gave proper notice of her work-related injury. We would submit that notice and whether or not claimant knew the extent of her benefits was not an issue at the CCH and were waived by the stipulation that the claimant had suffered a work-related injury for which she was receiving medical benefits and TIBS. The CCH record reveals the parties expressly stated at the outset that the sole contested issue to be considered was whether TIBS may be suspended on the basis of abandonment of medical treatment without good cause. The hearing officer's finding that the claimant was unaware of her workers' compensation benefits, especially medical benefits, and that consequently she did not see a doctor until she went to a required medical examination, although not incorrect, was unnecessary or superfluous to the issue in this case. Even if we were to find that the hearing officer's finding was erroneous, which we do not, any

error would have been harmless error. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

II

Carrier's second contention of error is Finding of Fact No. 6 that the claimant had transportation problems getting to a doctor, with the hearing officer listing several reasons for the transportation problems. We note that the claimant stated that she was unable to go to the doctor for the reasons stated. Carrier's only evidence to the contrary was on cross-examination of claimant in attempting to find inconsistencies relating to how family members might have been able to rearrange their schedules to take her to the doctor or how claimant "could have availed herself of public transportation and/or a taxi." Whether or not this constitutes good cause for failing to seek medical care after the RME of July 6, 1992 is a factual question for the hearing officer's determination. We have consistently pointed out that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. *See* Article 8308-6.34(e) and Texas Workers' Compensation Commission Appeal No. 92721, decided February 18, 1993. The hearing officer, as the trier of fact, may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). Here the hearing officer chose to believe claimant's testimony that she was unable to go to the doctor because of her transportation problems. We will reverse the hearing officer, based on sufficiency of the evidence, only if the evidence supporting the hearing officer's determination is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

III

Carrier contends that the hearing officer erred in finding that the carrier "is liable for [claimant's] alleged compensable injury and further that [claimant] has not abandoned medical treatment that she cannot be presumed to have reached [MMI] because of her abandonment." This, of course, is the heart of the issue, and it is evident from the testimony at the CCH and the arguments presented on appeal that there is some misunderstanding of the effect of Tex. W.C. Comm'n 28 TEX, ADMIN. CODE § 130.4 (Rule 130.4). The claimant argues (pro se) that although the carrier can rely on presumption of MMI based on abandonment of medical treatment, there was good cause for her not going to the doctor. The hearing officer perpetuates this misstatement by saying Rule 130.4 gives the carrier that opportunity. The carrier further requests that "[TIBS] remain suspended. . . ."

Rule 130.4(b) provides a procedure for a workers' compensation insurance carrier to resolve whether an employee has reached MMI when MMI has not already been

certified by a doctor. Only to invoke this procedure, the carrier shall presume an employee has reached MMI if, among other things, the treating doctor has examined the employee at least twice for the same compensable injury, the number of days between the examinations is greater than 60, the examinations were held after TIBS began to accrue, and the treating doctor's medical reports filed with the carrier for all examinations and reports conducted after the first of the two examinations indicate a lack of medical improvement in the employee's condition from the first of the two examinations. Rule 130.4(c) provides that a carrier may also invoke the Rule 130.4 procedure if it appears the employee has failed to attend two or more consecutively scheduled health care appointments. Although none of the above occurred, invoking this procedure at the BRC on November 4th seems to have accomplished, in part, the desired effect of getting the claimant into medical treatment.

According to the BRC report, signed November 10, 1992, the BRO's "recommendation" was:

> I find that there exists no medical evidence which would indicate continued disability as the result of the 04-16-92 accident prior to 07-06-92. However, as there are no provisions under the Act or the Rules to allow a Carrier to take credit for an "overpayment" I cannot allow the carrier to do so in this situation. I find the Employee did have good cause in not seeking medical attention immediately following the injury and up to the 07-06-92 visit with Dr. W. I do not find the Employee had good cause in failing to obtain medical treatment after the 07-06-92 visit with Dr. W as she knew or should have known that the Carrier would pay for medical treatment at the very least with Dr. W if not a doctor of her own choosing. As such, I am entering an Interlocutory Order allowing the Carrier to suspend TIBS as of 11-04-92 on the basis of abandonment of medical treatment.

Carrier took the position at the BRC than an interlocutory order should be issued, allowing it to suspend income benefits (not medical) on the basis that the claimant had abandoned medical treatment.

We have previously held that the "presumption" of MMI stated in Rule 130.4 is not a presumption of MMI at all but serves only to invoke the MMI resolution procedures of that rule. *See* Texas Workers' Compensation Commission Appeal No. 92389, decided September 16, 1992; Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992; Texas Workers' Compensation Commission Appeal No. 92671, decided February 3, 1993; and Texas Workers' Compensation Commission Appeal No. 93055, decided March 10, 1993. Once the BRO recommended (BROs only make recommendations regarding unresolved issues and payment or denial of benefits. Article 8308-6.15(d)) that the Rule 130.4 procedures were indeed invoked by such

"presumption," the Rule 130.4 procedures were set in motion to lead to the resolution of the ultimate issue of MMI through a doctor's certification. *See* Appeal Nos. 92389, 92456, 92671 and 93055, *supra*. In this case we question whether the Rule 130.4 is applicable at all in that the only doctor claimant saw before October 29, 1992 was Dr. W, the RME doctor, who stated the claimant "needs further evaluation." That comment by the RME doctor would indicate MMI had not been reached. The treating doctor, Dr. S, saw claimant for the first time on October 29th and claimant has been seeing him since that time with some degree of regularity. As previously indicated, the procedure, although improperly applied, has in part had the effect of getting the claimant into medical treatment. The hearing officer properly found that claimant is not to be presumed to have reached MMI and is entitled to TIBS.

There further appears to be a misconception of the aim of the dispute resolution process in a workers' compensation case, as evidenced by carrier's request that TIBS remain suspended. Rather than continue a temporary suspension of TIBS, the aim of the process should be the final resolution of the case.

The decision of the hearing officer that the claimant is not presumed to have reached MMI, that claimant is entitled to TIBS and the BRO's interlocutory order suspending TIBS is dissolved is hereby affirmed. The parties now need to take whatever steps are appropriate to move this dispute to its ultimate resolution.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge